Supreme Court, U.S.
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No. _____ OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

LOUIS H. RAWSON,
Petitioner,

v.

TOSCO REFINING COMPANY,
Respondent.

Petition for a Writ of Certiorari to the California Court of Appeal, First Appellate District

---

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under *Livadas v. Bradshaw*, 512 U.S. 107, 125 (1994), may a State adopt a rule that union employees are denied statutory overtime rights in the absence of any express waiver, solely because they are covered by collective bargaining agreements providing premium pay in any amount for overtime work and wages at least $1.00 above the minimum wage?

PARTIES TO THE PROCEEDINGS BELOW

All parties to the proceedings in the courts below are listed in the caption.

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IN THE

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No. ———

LOUIS H. RAWSON,

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TOSCO REFINING COMPANY,

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Petition for a Writ of Certiorari to the California Court of Appeal, First Appellate District

---

PETITION FOR A WRIT OF CERTIORARI

Petitioner Louis H. Rawson prays that the Court issue a writ of certiorari to review the judgment of the Court of Appeal for the State of California, First Appellate District, in this case.

OPINIONS BELOW

The decision of the Superior Court of the State of California for the County of Contra Costa is set forth at pages 8a to 10a of the Appendix, (App. 8a-10a). The decision of the Court of Appeal for the First Appellate District, Division Four, is reported at 57 Cal. App. 4th 1520 (1997), and is set forth in the Appendix at App. 1a-7a. On December 23, 1997, the California Supreme Court denied Rawson's petition for review, Justice Mosk dissenting. App. 11a.

JURISDICTION

The California Supreme Court denied review on December 23, 1997. This Court has jurisdiction under 28 U.S.C. § 1257.

STATUTES INVOLVED

Section 7 of the National Labor Relations Act, 29 U.S.C. § 157, provides in relevant part:

> Employees shall have the right of self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *.

Section 301(a) of the Labor-Management Relations Act, 29 U.S.C. § 185(a), provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Industrial Welfare Commission (IWC) Order 1-89(3)(A), 8 Cal. Code Reg. § 11010(3)(A) has provided in relevant part:

> Employment beyond eight (8) hours in any workday or more than six (6) days in any work week is permissible provided that the employee is compensated for such overtime at not less than:
>
> (1) one and one-half times the employee's regular rate of pay for all hours worked in excess of eight (8) hours up to and including twelve (12) hours in any workday, and for the first eight (8) hours worked on the seventh (7th) day of work; and

> (2) double the employee's regular rate of pay for all hours worked in excess of twelve (12) hours in any workday, and for all hours worked in excess of eight (8) hours on the seventh (7) day of work in any work week.

IWC Order 1-89(3), 8 Cal. Code Reg. § 11010(3)(F), has provided in relevant part:

> Except as provided in subsections (C) and (E), this section shall not apply to any employee covered by a collective bargaining agreement if said agreement provides premium wage rates for overtime work and a cash wage rate for such employees of not less than one dollar ($1.00) per hour more than the minimum wage.

STATEMENT OF THE CASE

A. Facts

The facts are not in dispute.

Petitioner Louis Rawson is employed at an oil refinery in Martinez, California operated by Respondent Tosco Refining Company. App. 1a. Tosco Refining Company is party to a collective bargaining agreement with the Oil, Chemical & Atomic Workers Local 1-5 ("OCAW") covering Rawson. This collective bargaining agreement provides for a cash wage rate of not less than $1.00 per hour more than the minimum wage, and some premium for overtime work. App. 9a. The agreement provides for time and one-half for all hours worked in excess of eight hours in any 24-hour period, but does not separately provide a higher premium for hours worked in excess of twelve hours in a day. App. 2a. Rawson and his coworkers at Tosco are paid time and one-half for work in excess of twelve hours in a day. App. 2a.

Industrial Welfare Commission (IWC) Order 1-89(3), 8 Cal. Code Reg. § 11010(3), requires that all California industrial workers be paid double time for time worked over twelve hours in a day. The only exception is for

workers, who like Rawson, are covered by collective bargaining agreements. IWC Order 1-89(3), 8 Cal. Code Reg. § 11010(3)(F).

The validity of the exception is the focus of this litigation.

B. Proceedings Below

Rawson brought this putative class action on behalf of himself and other Tosco refinery workers on September 26, 1995. The action seeks to recover overtime wages at the general double-time rate established by the IWC Order 1-89. App. 2a n.2. The action challenges the exemption for unionized employers in IWC Order 1-89(3)(F) as invalid under federal law.

The Superior Court for Contra Costa County, Hon. Barbara A. Zuniga, granted Tosco's motion for summary judgment on October 7, 1996. App. 8a-10a. The Superior Court held that IWC Order 1-89(3)(F) is a valid exemption under federal labor law. *Id.*

On September 30, 1997, the California Court of Appeal for the First Appellate District, Division Four, affirmed the Superior Court's judgment. 57 Cal. App. 4th 1520, App. 1a-7a. The Court of Appeal acknowledged that, under *Livadas v. Bradshaw*, 512 U.S. 107, 117 (1994), a State may not decline to enforce a state wage-and-hour law merely because the employee is subject to a collective-bargaining agreement. App. 4a. The Court of Appeal reasoned, however, that the U.S. Supreme Court approved state-law distinctions between union and non-union employees in the application of minimum labor standards, provided that "union represented employees have the full protection of the minimum standard, absent any agreement for something different." App. 4a, *quoting Livadas*, 512 U.S. at 131. The Court of Appeal concluded that "Rawson did not relinquish his right to double pay for certain overtime work merely by being an employee covered by a collective bargaining agreement. His

rights to the state mandated double time pay were relinquished because his union and employer expressly agreed to a rate of overtime pay which met at least the minimum requirements imposed by . . . [IWC Order 1-89(3)(F)]." App. 4a-5a.

On December 23, 1997, the California Supreme Court denied review. Justice Mosk dissented from denial of review. App. 11a.

REASONS FOR GRANTING THE WRIT

The Supreme Court should grant certiorari because the Court of Appeal's decision raises an important question of federal law that this Court should resolve.

This Court has repeatedly held that state-law employment standards may not be withheld from union workers unless, at a minimum, their union has clearly and unmistakably relinquished those standards. *See Livadas*, 512 U.S. at 125; *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 409-410 n.9 (1988). The principle in *Livadas* and *Lingle* will be meaningless if the States dispense with any requirement of actual waiver.

The crux of this case is whether California may deem Rawson's union to have opted out of the state-law IWC overtime wages, just because the union bargained for *some* overtime premium without separately providing for a special rate after twelve hours.

I. THE COURT OF APPEAL'S DECISION NULLIFIES *LIVADAS*.

If courts infer that unions have opted out of minimum labor standards too liberally, the principle of *Livadas* will become a dead letter.

In *Livadas*, the California Labor Commissioner argued that the plaintiff (a unionized grocery clerk) had "opted out" of access to the Labor Commissioner's enforcement of the state Labor Code. The Labor Commissioner ar-

gued that Livadas' union had chosen to forego such enforcement by negotiating for arbitration in its labor contract. *Livadas*, 512 U.S. at 127. The Labor Commissioner argued, as the Industrial Welfare Commission has dictated here, that any union contract negotiating its "own" wage provisions must be deemed to surrender any statutory rights not expressly provided in the contract. *Cf. Livadas*, 512 U.S. at 128. The Court rejected this argument, explaining that any relinquishment of such state-law protections in collective bargaining would have to be "clear and unmistakable for a court even to consider whether it could be given effect . . ." *Livadas*, 512 U.S. at 125, *citing Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 409-410 n.9 (1988) (quoting *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983)).

Under this standard, the union must clearly specify the rights it is giving up in order to demonstrate a conscious relinquishment: "We will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is 'explicitly stated.' " *Metropolitan Edison*, 460 U.S. at 708. Express agreement on alternate terms is not sufficient. If it were, any union agreement on terms that a State deems related to a statutory subject could be taken as an "opt-out." This result would nullify the anti-discrimination rule in *Livadas*. Instead, the standard requires a conscious acknowledgement of the statutory right that the union intends to forgo.

II. THERE IS NO DIFFERENCE BETWEEN AN "OPT-OUT" AND A WAIVER.

The Court of Appeal held that the "clear and unmistakable waiver" standard does not apply in this case, on the ground that state law does not prohibit the parties from negotiating rates other than those established by wage orders, even if those alternate provisions do not refer to all protections available under the law. App. 6a-7a.

This reasoning is circular. A union's negotiation of *some* overtime provision is not the same as an explicit waiver of *all* statutory overtime rights not included in the parties' agreement. There is no real difference between a ruling that a union has "opted out" of a minimum labor standard and one that the union has "waived" such a standard. The effect on the union's members is the same. Whether it is stated as an "opt out" or a "waiver," state law violates the non-discrimination principle in *Livadas* if it denies benefits to employees because of their collective bargaining activity, where their collective contract negotiation does not reflect an explicit intent to forego the statutory standard.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

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APPENDICES

APPENDIX A

[Filed Sep. 30, 1997]

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

A076689
(Contra Costa County Super. Ct. No. C95-04284)

LOUIS H. RAWSON,
Plaintiff and Appellant,

v.

TOSCO REFINING COMPANY,
Defendant and Respondent.

Plaintiff, Louis H. Rawson, appeals from a judgment entered on a motion for summary judgment in favor of defendant his employer, Tosco Refining Company (Tosco). Rawson objects to a wage order of the Industrial Welfare Commission (Cal. Code Regs., tit. 8, § 11010, subd. 3(A); Wage Order No. 1-89) which permits him as a member of a collective bargaining unit which has a qualifying agreement with Tosco on overtime pay rates to be paid less than the order would require him to be paid were he not subject to such a collective bargaining agreement on overtime pay. (Cal. Code Regs., tit. 8, § 11010, subd. 3(F).)

Under the wage order employees required to work more than twelve hours in any workday or for hours

beyond eight worked on the seventh day of a work week are to be paid double their regular rate of pay. (Cal. Code Regs., tit. 8, § 11010, subd. 3(A)(2).)[1] Rawson sought to recover the difference between the double time pay required by the wage order and the time and half pay provided for by his collective bargaining agreement.[2]

Discussion

Tosco's motion for summary judgment was granted on undisputed facts. Therefore the sole question before the trial court and before this court is a question of law. (*Bashi v. Wodarz* (1996) 45 Cal.App.4th 1314, 1318.) What is in dispute is whether the overtime pay provisions in California Code of Regulations, title 8, section 11010, subdivision 3(F) of the wage order are valid as a collectively bargained for opt-out from the state's wage scheme or are infirm because they impermissibly burden Rawson's right to collective bargaining under the National Labor Relations Act (NLRA or the Act). (29 U.S.C. §§ 151, et seq.) California Code of Regulations, title 8, § 11010, subdivision 3(F) provides that "this section shall not apply to any employee covered by a collective bargaining

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[1] Title 8, California Code of Regulations, section 11010, subdivision 3(A) provides in pertinent part: "Employment beyond eight (8) hours in any workday or more than six (6) days in any workweek is permissible provided the employee is compensated for such overtime at not less than: [¶] (1) One and one-half (1½) times the employee's regular rate of pay for all hours worked in excess of eight (8) hours up to and including twelve (12) hours in any workday, and for the first eight (8) hours worked on the seventh (7th) day of work, and [¶] (2) Double the employee's regular rate of pay for all hours worked in excess of twelve (12) hours in any workday and for all hours worked in excess of eight (8) hours on the seventh (7th) day of work in any workweek."

[2] Rawson's first amended complaint, styled as a class action, consists of a first cause of action for failure to pay overtime wages at the rate established by the work order and a second cause of action alleging a violation of Business and Professions Code section 17200 for that failure.

agreement if said agreement provides premium wage rates for overtime work and a cash wage rate for such employees of not less than one dollar ($1.00) per hour more than the minimum wage." Rawson argues here, as he did below, this opt-out provision is infirm because it has denied him as an employee whose collective bargaining agreement provides lower wage rates the full protection the state otherwise accords employees who are not covered by collective bargaining agreements and therefore must receive double pay under the wage order.

Pre-emption

In evaluating a claim of pre-emption a state regulation will be sustained unless it conflicts with federal law, stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the federal law, or from the totality of circumstances it would appear Congress had sought totally to occupy the field. (*Metropolitan Life Ins. Co.* v. *Massachusetts* (1985) 471 U.S. 724, 747-748; *Brown* v. *Hotel Employees* (1984) 468 U.S. 491, 501.)

Rawson's pre-emption claim is that the provisions in California Code of Regulations, title 8, section 11010, subdivision 3(F) which permit a reduced overtime wage if collectively bargained for penalizes exercise of collective bargaining rights granted him by the NLRA. He relies upon decisions of the United States Supreme Court which have held it impermissible for a state to withdraw a benefit from an employee who was engaging in practices otherwise protected and encouraged by the Act. Thus a state may not withhold unemployment benefits from an employee because she has filed a charge of unfair labor practices with the National Labor Relations Board. (*Nash* v. *Florida Industrial Comm'n.* (1967) 389 U.S. 235, 239.) Nor may it decline to enforce a state law requiring immediate payment of all wages owed upon termination of employment merely because the employee is subject

to a collective bargaining agreement which contains an arbitration provision. (*Livadas* v. *Bradshaw* (1994) 512 U.S. 107, 117.)

In *Livadas* the court addressed certain provisions in state and federal laws which draw distinctions between union and nonunion represented employees and noted that "virtually all" were alike in "that union represented employees have the full protection of the minimum standard, absent any agreement for something different." (*Livadas* v. *Bradshaw, supra*, 512 U.S. at p. 131.) The court then noted that its holding "should cast no shadow on the validity of these familiar and narrowly drawn opt-out provisions." (At p. 132.)

Obviously, the question before us is whether California Code of Regulations, title 8, section 11010, subdivision 3(F) is such a valid opt-out provision which is not preempted. The wage order does indeed provide exactly the protection described in the opt-out provisions described in *Livadas*. It provides to union represented employees the same protections it accords to non union represented employees, unless their collective bargaining agreement provides for a different wage scheme.[3] An identically worded provision in another California wage order applicable to broadcast employees has been upheld against a preemption claim by the Ninth Circuit as precisely the sort of provision discussed with approval in *Livadas*. (*National Broadcasting Co., Inc.* v. *Bradshaw* (9th Cir. 1995) 70 F.3d 69, 71; Cal. Code Regs., tit. 8, § 11110, subd. 3(F); Wage Order No. 11-80.)

Here, Rawson, did not relinquish his right to double pay for certain overtime work merely by being an employee covered by a collective bargaining agreement. His rights to the state mandated double time pay were relin-

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[3] Moreover, the collective bargaining agreement must itself meet two criteria to supplant the wage scheme of Wage Order 1-89. It must provide both a premium wage for overtime work and an hourly cash wage of at least $1 above the minimum wage.

quished because his union and his employer expressly agreed to a rate of overtime pay which met at least the minimum requirements imposed by California Code of Regulations, title 8, section 11010, subdivision 3(F). (See *Livadas* v. *Bradshaw, supra,* 512 U.S. at p. 131.)

Rawson's claim is essentially the employee corollary of that unsuccessfully advanced by an employer in *Fort Halifax Packing Co.* v. *Coyne* (1987) 482 U.S. 1. In that case, Maine law provided for a one-time plant closing severance payment of one week for every year of employment for any employee without "an express contract providing for severance pay." (*Id.* at p. 4, fn. 1.) The employer argued the effect of the state law was to undercut its ability to resist union demands for severance pay and thus to impermissibly burden its freedom to collectively bargain for the terms and conditions of employment. (*Id.* at pp. 19-20.) The Supreme Court rejected the notion that a state mandated minimum labor standard undercuts collective bargaining under the Act. It noted that both employers and employees come to bargaining with certain state granted rights which form a backdrop to their negotiations. (*Id.* at p. 21.) In short, preemption is not required merely because "a state statute pertains to matters over which the parties are free to bargain. . . ." (*Ibid.*)

Rawson's objection merely comes from the other side of the bargaining table. The impact of California Code of Regulations, title 8, section 11010, subdivision 3(F) here is no different. Absent a negotiated provision in the collective bargaining agreement (a provision which in this instance also must meet certain minimum standards) an employee covered by that agreement will be entitled to the wage order's rate of overtime pay. On its face neither subdivision 3(F) nor the Maine law prohibit negotiated overtime pay or severance pay which is less than the state mandated minimum for employees who lack a contractual agreement on the subject. We cannot say that subdivision

3(F) constitutes an impermissible intrusion into the collective bargaining process which results in its pre-emption by the Act.

Waiver

Finally, Rawson argues California Code of Regulations, title 8, section 11010, subdivision 3(F) is infirm because it does not require the collective bargaining agreement to contain a "clear and unmistakable waiver" of his state law rights as an employee to double time pay. The simple answer is that the issue never arises in this case.

In *Lingle* v. *Norge Division of Magic Chef, Inc.* (1988) 486 U.S. 399, the Supreme Court held that a state law claim for retaliatory discharge was a claim independent of a collective bargaining agreement and was therefore not pre-empted under the principle that federal law will be the basis for interpreting such agreements. (*Id.* at p. 407.) In a footnote the court declined to reach the related issue of whether a union may waive its members' individual, nonpre-empted state-law rights. (*Id.* at p. 409, fn. 9.) Significant for our purposes, however, is the fact that in *Lingle* state law also expressly provided that the parties to a collective bargaining agreement could not agree to waive the state's prohibition against retaliatory discharge. More recently in *Livadas* the Supreme Court did no more than note that the question was not before it whether plaintiff's union had "sought or purported to bargain away" her statutory right to immediate payment of all wages upon termination—a right which may not be "contravened or set aside by a private agreement" under California law. (*Livadas* v. *Bradshaw*, *supra*, 512 U.S. at p. 125; Lab. Code, § 219.)[4]

Rawson cites no California statute which prohibits contractual agreements for overtime pay rates lower than

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[4] Labor Code section 219 provides in pertinent part: "[N]o provision of this article can in any way be contravened or set aside by a private agreement, whether written, oral, or implied."

those otherwise established by wage orders. Absent such a statutory bar to this overtime agreement we need not reach the question of whether California Code of Regulations, title 8, section 11010, subdivision 3(F) must include a requirement of clear and unmistakable waiver of the nonexistent statute's protections.

Disposition

The judgment is affirmed.

POCHÉ, Acting P.J.

We concur:

REARDON, J.

HANLON, J.

APPENDIX B

[Filed Oct. 5, 1996]

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
COUNTY OF CONTRA COSTA

No. C95-04284

LOUIS H. RAWSON,
individually and on behalf of all others similarly situated,
Plaintiff,

v.

TOSCO REFINING COMPANY,
a Division of TOSCO CORPORATION,
Defendant.

ORDER GRANTING DEFENDANT TOSCO REFINING COMPANY'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

The cross-motions of Plaintiff Louis Rawson and of Defendant Tosco Refining Company for summary judgment came on regularly for hearing on September 19, 1996, in Department 2 of the Court, The Honorable Barbara A. Zuniga presiding. Based upon the parties' acceptance of the Court's tentative ruling, the tentative ruling became the order of the Court without oral argument.

After full consideration of the evidence and points and authorities submitted by both parties, and good cause appearing therefor,

IT IS HEREBY ORDERED:

1. Defendant's motion for summary judgment is GRANTED. There is no material issue of fact in dis-

pute, and defendant is entitled to judgment as a matter of law. It is undisputed that the collective bargaining agreement between Tosco and plaintiff's union fully complies with IWC Wage Order 1-89(3)(F), 8 Cal.Code Reg. § 11010(3)(F) (1989), which provides an exemption to the wage order's overtime pay provisions set forth in TWC 1-89(3)(A)(2) for parties to a collective bargaining agreement containing certain minimum and overtime wage provisions. Contrary to plaintiff's argument, the case of *Livadas v. Bradshaw*, (1994) 144 S. Ct. 2068, does not invalidate the exemption contained in IWC Wage Order 1-89, and the Court in *Livadas* specifically recognized the validity of opt-out agreements such as the wage order exemption at issue here: "Our holding that the Commissioner's unusual policy is irreconcilable with the structure and purposes of the Act should cast no shadow on the validity of these familiar and narrowly-drawn opt-out provisions." *Id.* at 2082. The court in *NBC v. Bradshaw* (9th Cir. 1995), 70 F.3d 69, followed *Livadas* and held that an opt-out provision similar to the one at issue here was not invalid and not preempted by the National Labor Relations Act.

The authority cited by plaintiff does not support his argument that the wage order exemption is preempted by federal law or that it is otherwise invalid, and the case of *Metropolitan Edison v. NLRB* (1983), 460 U.S. 693, 103 S.Ct. 1467, is not on point in that it involved a "no strike" provision in a collective bargaining agreement. In the instant case, there is no question of waiver, since the statute specifically allows for union employees to opt out of the state's minimum labor protections by negotiating for terms falling within the exemption. This Court concludes, therefore, as have federal courts, that the wage order exemptions are valid "opt-out provisions," not preempted by federal law. Defendant's compliance with the wage order exemptions defeats plaintiff's first cause of action for failure to pay overtime wages under Labor Code § 1194. Because plaintiff's second cause of action,

for violation of Business and Professions Code § 17200, is merely derivative of his first cause of action, it is also defeated.

2. Judgment shall be entered in favor of defendant Tosco Refining Company and dismissing plaintiff's complaint, and defendant is to recover its allowable costs pursuant to Cal. Civ. Proc. Code § 1032.

3. Given the Court's ruling granting summary judgment in favor of defendant, plaintiff's motion for summary judgment is moot.

IT IS SO ORDERED.

Dated: 10-5-96

/s/ Barbara Zuniga
BARBARA ZUNIGA
THE HONORABLE BARBARA A. ZUNIGA
Contra Costa County Superior Court

APPROVED AS TO FORM

/s/ Michael T. Anderson
MICHAEL T. ANDERSON
Attorney for Plaintiff Louis Rawson

APPENDIX C

[Filed Dec. 23, 1997]

First Appellate District, Division Four,
No. A076689 S065642

IN THE SUPREME COURT OF CALIFORNIA

LOUIS H. RAWSON,
Appellant

v.

TOSCO REFINING COMPANY,
Respondent

Appellant's petition for review DENIED.

Mosk, J., is of the opinion the petition should be granted.

/s/ George
Chief Justice

Supreme Court, U.S.
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OCTOBER TERM, 1997

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On Petition For A Writ Of Certiorari To The California Court of Appeal, First Appellate District

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BRIEF IN OPPOSITION

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18 pp

QUESTION PRESENTED

Whether a State may permissibly provide that state-prescribed overtime pay rates do not apply to parties to a collective bargaining agreement that contains its own overtime pay provisions.

RULE 29.6 STATEMENT

Respondent Tosco Refining Company is a division of Tosco Corporation. Tosco Corporation, a publicly-owned corporation, has no parent corporation and no nonwholly-owned subsidiaries.

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II. PETITIONER DOES NOT ALLEGE A CONFLICT, AND THERE IN FACT IS NO CONFLICT, ON THE ISSUE DECIDED BY THE COURT BELOW 10

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

NO. 97-1496

LOUIS H. RAWSON,

Petitioner,

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TOSCO REFINING COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The California Court of Appeal, First Appellate District

---

BRIEF IN OPPOSITION

Respondent Tosco Refining Company ("Tosco") respectfully submits this brief in opposition to the petition for a writ of certiorari.

OPINIONS BELOW

The opinion of the California Court of Appeal, First Appellate District (Pet. App. 1a-7a) is reported at 57 Cal. App. 4th 1520 (1997). The opinion of the Superior Court for the State of California, County of Contra Costa,

granting summary judgment (Pet. App. 8a-10a) is not reported.

JURISDICTION

The judgment of the Court of Appeal of the State of California, First Appellate District, was entered on September 30, 1997. The California Supreme Court denied a petition for discretionary review on December 23, 1997. The petition for a writ of certiorari was filed on March 11, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (1994).

STATEMENT

1. Petitioner has been employed by Tosco as a refinery unit operator since September 8, 1992. He has been a member of the bargaining unit represented exclusively by the Oil, Chemical and Atomic Workers International Union Local 1-5, AFL-CIO ("Union") during his entire employment. *See* Appellant's Appendix in Lieu of Clerk's Transcript ("C.A. App.") at 181-82. Since at least 1944, Tosco's refinery has operated 24 hours a day, seven days a week, and its refinery operators, among other positions that must be staffed around the clock, work on shift schedules, consistent with industry practice. *Id.* at 183-84.

Provisions concerning overtime pay for Tosco's refinery workers have been negotiated with the Union and made a part of the collective bargaining agreement ("CBA") for more than 50 years. C.A. App. at 183-84. The CBA contains overtime pay provisions particularly appropriate to the refining industry and tied to the shift schedule. Those provisions provide for time and one-half for all hours worked over eight hours in a 24-hour period. *Id.* at 184-85 In some cases, that premium rate is paid for hours that

otherwise would not be eligible for overtime compensation under state law.[1]

Effective February 1, 1996, the Union and Tosco agreed to a new, three-year contract, reaffirming those overtime wage provisions. That contract was ratified by an overwhelming majority of the bargaining unit members. C.A. App. at 182-83.

2. Petitioner filed this action in the Superior Court of the State of California, County of Contra Costa, on September 26, 1995, alleging that he and his fellow union workers at Tosco are entitled to a higher rate of overtime pay than is provided for under the terms of the CBA.

Under California law, the State's Industrial Welfare Commission has authority to promulgate wage orders setting forth rates of pay for employees in particular industries. *See* Cal. Labor Code § 1173 (Deering 1998).[2] Industrial Wage Commission ("IWC") Wage Order 1-89,

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[1] For example, employees are paid overtime for the entire first hour of overtime, even if they work only a portion of the hour, CBA, § 7.013; C.A. App. at 184-85, and are paid overtime for all work on the first day of a new schedule if the schedule is changed with less than 40 hours notice. CBA § 7.011(d); C.A. App. at 184-85. Moreover, workers subject to the CBA are entitled to a minimum of four hours of pay if they are called to return to the refinery after a regular shift of eight hours, even if they do not work the entire four hours (or any of it). (CBA, § 7.014; *see* C.A. App. at 184-85)

[2] There are 15 wage orders, each covering particular industry occupations, such as professional and technical, public housekeeping, transportation, broadcasting, motion picture, amusement and recreation, and agricultural.

the order applicable to the refining industry, provides that employees who work more than twelve hours in a single day (or more than eight hours in the seventh day of the workweek) must be paid at least double the regular rate of pay for that overtime. 8 Cal. Code Reg. §11010(3)(A)(2). IWC Wage Order 1-89(3), however, sets forth an exemption from the order's overtime-pay requirements:

> Except as provided in subsections (C) and (E)[3], this section shall not apply to any employee covered by a collective bargaining agreement if said agreement provides premium wage rates for overtime work and a cash wage rate for such employees of not less than one dollar ($1.00) per hour more than the minimum wage.

8 Cal. Code Reg. §11010(3)(F). Petitioner's theory in bringing suit was that this exemption was preempted by federal law, because *Livadas v. Bradshaw*, 512 U.S. 107 (1994), established that the State may not deny him the benefit of state-law protections simply because he is covered by a collective bargaining agreement.

3. On cross-motions for summary judgment, the Superior Court dismissed petitioner's complaint in its entirety. The court disagreed with petitioner that *Livadas* has any application to cases, like this one, where state law merely permits employees or their unions to contract out of default rules provided by state law. The Superior Court explained that *Livadas* expressly noted that its reasoning "should cast no shadow on the validity of these familiar and

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[3] Those subsections, not relevant here, apply to overtime rates for minors and provision of meal facilities.

narrowly drawn opt-out provisions." Pet. App. 9a (quoting *Livadas, 512 U.S. at 132*). The court also rejected petitioner's argument that *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983), required the wage order exemption to contain a "clear and unmistakable waiver." The court noted that *Metropolitan Edison* "involved a 'no strike' provision in a collective bargaining agreement" and thus was simply "not on point." Pet. App. 9a.

4. The California Court of Appeal, First Appellate District, affirmed. The court examined the holding of *Livadas*, and in particular the portion of the opinion that addressed provisions in state and federal laws that draw distinctions between union and nonunion represented employees, and noted this Court's recognition that "virtually all" such provisions are alike in that "union represented employees have the full protection of the minimum standard, absent any agreement for something different." Pet. App. 4a (citing *Livadas*, 512 U.S. at 131). The court then focused on the question whether the wage order exemption at issue in this case is a "valid opt-out provision which is not preempted" under *Livadas*. Pet. App. 4a. Relying upon federal authority in support of its position, and in particular this Court's decision in *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987), the Court of Appeal held that the state wage order exemption was not an impermissible intrusion into the collective bargaining process. Pet. App. 5a-6a.

The Court of Appeal also rejected petitioner's contention that the exemption is invalid "because it does not require the collective bargaining agreement to contain a 'clear and unmistakable waiver' of his state law rights as an employee to double time pay." Pet. App. 6a. The court distinguished the cases upon which petitioner based his argument on the ground that petitioner had not cited to any

statute prohibiting contractual agreements for different overtime pay rates than those established by the wage orders. Pet. App. 6a-7a.

5. The California Supreme Court denied further review on December 23, 1997. Pet. App. 11a.

REASONS FOR DENYING THE WRIT

Petitioner renews his contention that IWC Wage Order 1-89 is inconsistent with *Livadas*. The Court of Appeal correctly resolved that claim, and its decision does not conflict with any decision of this Court or of any other court. Further review is therefore not warranted.

I. The California Court of Appeal Correctly Rejected Petitioner's Interpretation of *Livadas*

1. Section 7 of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 157 (1994), guarantees employees the right to bargain collectively, and Section 8(a)(1), 29 U.S.C. § 158(a)(1) (1994), makes it an unfair labor practice for an employer to impede an employee's exercise of that right. Because this Court has recognized that the NLRA confers rights "on employees and not merely as against the employer," *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 109 (1989) (citation omitted), however, state laws that nullify the rights of employees under the NLRA have been held to be preempted under the Supremacy Clause. *See, e.g., Nash v. Florida Indus. Comm'n*, 389 U.S. 235, 239-40 (1967) (invalidating state law that denied unemployment benefits to persons who, as permitted by the NLRA, had filed an unfair labor practice charge).

Livadas involved a narrowly circumscribed application of that principle. In that case, California law required that

all wages earned and unpaid at the time of an employee's discharge be paid upon discharge, and it provided a penalty for non-compliance with that requirement. *See* 512 U.S. at 111-12 (discussing Cal. Lab. Code §§ 201, 203 (Deering 1991)). California's Labor Commissioner, however, had a policy of refusing to enforce claims for untimely payment of final wages where the claim was brought by an employee who was covered by a collective bargaining agreement that contained an arbitration clause. This Court held that the Commissioner's policy was preempted by federal law because it predicated state law benefits on refraining from joining a union, conduct protected by Section 7 of the NLRA. *See* 512 U.S. at 110.

The distinction between this case and *Livadas* is plain. The CBA that covered Livadas' employment had *no provision whatsoever* concerning the time for payment of final wages; nevertheless, the Labor Commissioner's policy resulted in the rejection of her claim simply because she was a member of a union that had negotiated a CBA governing *other* terms and conditions of her employment. In this case, state-law benefits are not predicated on refraining from conduct protected by federal labor law. Rather, the California wage orders recognize such protected conduct by permitting unionized workers to choose — they may decide through collective bargaining how they should be paid premium pay for overtime work. In the absence of such a provision in a collective bargaining agreement, they will be covered by the wage order. The wage orders thus permit parties to "opt in" or "opt out" of the state-law overtime wages. It has long been settled that such freedom to "contract out of" state minimum labor standards is perfectly consistent with federal labor law. *See Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1, 22-23 (1987) (noting that "[t]he fact that the parties are free to devise

their own . . . arrangements . . . strengthens the case that the statute works no intrusion on collective bargaining").

Indeed, *Livadas* itself recognized and emphasized the importance of this distinction:

> While the Commissioner and her *amici* call our attention to a number of state and federal laws that draw distinctions between union and nonunion represented employees, . . . virtually all share the important second feature observed in *Coyne*, that union-represented employees have the full protection of the minimum standard, absent any agreement for something different. *These "opt out" statutes are thus manifestly different in their operation (and their effect on federal rights) from the Commissioner's rule that an employee forfeits his state law rights the moment a collective-bargaining agreement with an arbitration clause is entered into.*

512 U.S. at 131-32 (emphasis added). Accordingly, in invalidating "the Commissioner's unusual policy" this court "cast no shadow on the validity" of such opt-out provisions. *Id.* at 132. The courts below hardly committed error in faithfully heeding that admonition.

2. Petitioner fares no better by characterizing the issue, in passing, as one involving the standard of "waiver" that applies in cases like this one, and by contending that the "waiver" must be "clear and unmistakable." Pet. 6-7. That contention scarcely lends support to petitioner's basic claim that the Court of Appeal departed from *Livadas*, since this Court made perfectly clear in *Livadas* that *no* waiver issue was before it: Not only was it clear that the right at issue was expressly made non-waivable by

California law (*see* 512 U.S. at 111, n. 3, *citing* Cal. Labor Code § 219 (Deering 1991)), but also "[t]here [was] no suggestion . . . that Livadas' union sought or purported to bargain away her protections under § 201 or § 203 . . .." 512 U.S. at 125.

Metropolitan Edison Co. v. NLRB, 460 U.S. 693 (1983), which petitioner also cites (Pet. 6), is even farther afield. In that case, employees of Metropolitan Edison, represented by the Electrical Workers Union, engaged in unlawful strikes against the company, in violation of the "no-strike" clause in their collective bargaining agreement. On each occasion, the company disciplined the union officials more severely than the other union members. The union filed grievances regarding the disparate treatment, and the arbitrator upheld the company's action on the ground that union officials have an affirmative duty to uphold the terms of the collective bargaining agreement. Several years later, employees of the company refused to cross an informational picket line, and the company again imposed harsher disciplinary penalties on the union officials. The union filed unfair labor practice charges against the company, and the company took the position that the prior arbitration awards were sufficient to impose a *contractual* duty on the union officials to cross the picket line. The company based its entire "waiver" argument on the fact that the union had lost two previous arbitrations on the issue, and had remained *silent* in subsequent contract negotiations. In rejecting the company's claim, this Court "recognized that a union may waive a member's statutorily protected rights," 460 U.S. at 705, but it concluded that, in the case before it, "[t]here [had been] no showing that the

parties intended to incorporate [the earlier arbitral awards] into the subsequent agreement." *Id.* at 709-10.[4]

Here, the overtime provision with which petitioner disagrees is expressly set forth in the collective bargaining agreement. Petitioner cites no authority for his unusual contentions that federal law requires the legislated exemption to contain a "clear and convincing waiver" requirement, or that the CBA provision must enumerate all of the overtime provisions that are *not* intended to be part of the parties' agreement. In fact, it is difficult to see how the agreement in this case could fail to meet *any* standard of waiver that might conceivably apply. That petitioner is forced to argue that his own standard of "explicitness" is *not* satisfied by "[e]xpress agreement" (Pet. 6) persuasively demonstrates the insubstantiality of his position.

II. Petitioner Does Not Allege A Conflict, And There In Fact Is No Conflict, On The Issue Decided By The Court Below

Petitioner does not even attempt to allege that the lower courts are in need of guidance on the meaning of *Livadas*, that the question he raises is recurring and important to litigation in other areas of the country, or that this case

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[4] It is clear that the *Metropolitan Edison* case did not deal with parties' rights to *bargain collectively* over the terms and conditions of their employment. The Court described the scope of its holding as involving "the narrow question . . . whether an employer may *unilaterally* define the actions a union official is required to take to enforce a no-strike clause and penalize him for his failure to comply." 460 U.S. at 700.

meets any other of the traditional prerequisites to this Court's plenary review.

To the contrary, the only other appellate court to consider the validity of California's exemptions has agreed with the conclusion reached by the courts below. In *NBC v. Bradshaw,* 70 F.3d 69 (9th Cir. 1995), the Ninth Circuit recognized the validity of a wage order exemption for employees covered by a collective bargaining agreement, *identical to the exemption challenged here.* In *NBC*, as here, the Wage Order covering employees in the broadcasting industry, number 11-80, also contained an exemption for collective bargaining agreements, identical to the exemption of IWC Wage Order 1-89, and the union made the same argument advanced by petitioner in this case — that *Livadas* compelled the court to hold that the exemption was preempted by federal law and therefore invalid. The court disagreed, and held that the exemption was a valid "opt out" provision upon which *Livadas* had no impact:

> [The union has] asked that we affirm the district court on the ground that the intervening Supreme Court decision in *Livadas* requires us to hold Wage Order 11-80's § 3(F) exemption invalid. We cannot accept this position as the Court in *Livadas* stressed that its holding "cast no shadow on the validity of . . . familiar and narrowly drawn opt-out provisions." *Livadas*, 114 S. Ct. at 2082. California has tailored such an opt-out provision in § 3(F) of Wage Order 11-80.

70 F.3d at 73; see also *Viceroy Gold Corp. v. Aubry*, 75 F.3d 482, 489-90 (9th Cir. 1996) (same). No other appellate decision has so much as discussed the issue. In

these circumstances, petitioner has offered no persuasive reasons for this Court's intervention.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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